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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 530

NELLIE FAYE BEAMER, ADMINISTRATRIX OF THE ESTATE OF ROBERT P. BEAMER, DECEASED,

Petitioner,

versus

THE VIRGINIAN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

ROBERT J. ASHWORTH,
DAVID D. ASHWORTH,
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Pearisburg, Virginia,
Counsel for Petitioner.

ASHWORTH & SANDERS,
Of Counsel.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Your petitioner, Nellie Faye Beamer, Administratrix of the Estate of Robert P. Beamer, deceased, respectfully prays for a Writ of Certiorari herein to review a certain final decision of the Supreme Court of the State of Virginia, being the highest Court in said State, in the above entitled action, the opinion and decision of said Court having been rendered and filed on the 14th day of June, 1943, and a petition and re-hearing which was after being entertained and considered by said Court, denied October 14, 1943; by which said decision the said Court affirmed

the judgment of the Circuit Court of Giles County, Virginia, in setting aside a verdict of a jury in favor of said Administratrix for $10,000.00.

The Circuit Court of Giles County did not take cognizance of the 1939 Amendment to the Federal Employers Liability Act, although plaintiff's decedent was injured and died on the 26th day of July, 1940, and set aside the verdict of the jury upon the sole ground that the deceased assumed the risk of employment as a matter of law. The Supreme Court of Virginia affirmed the decision of the Circuit Court, but held that "the other allegations of negligence were either not sustained by the evidence, or were not the proximate cause of the death of Mr. Beamer."

II.

The jurisdiction of this Court is invoked under Title 28, Chapter 9, Section 344, U. S. C. A. (Judicial Code, Section 237, amended), and this action was brought under Federal Employers Liability Act, U. S. C. A. Title 45, Sections 51 to 59, inclusive.

A question for jury determination is presented as to "negligence" when it appears from the evidence that an employee, subject to the benefits of the "Federal Employers Liability Act", is required to work at a place in a power plant replacing an expansion joint next to the ceiling of a basement, 30 feet high, where the temperature is 132° F., where the pipes are dusty and dirty and too hot to touch, where there is no manual or mechanical ventilating system except an air hose not feasible to use because of the accumulation of dust and dirt, where the place of work is not inspected and has no means of determining the condition of the air and heat, and, where such employee is required to finish the task before a certain time, dies as a result of working in such excessive heat.

It is for the jury to say, under such circumstances, whether or not the employer has performed his duty to use reasonable care in furnishing his employee with a safe place to work.

Evidence of general custom of a trade or business engaged in similar work under like circumstances is never conclusive but is proper evidence to be considered along with all the other evidence, facts and circumstances in the case as to whether or not the defendant is guilty of negligence.

The jury decided that the defendant was negligent; the trial Judge who heard the case and saw the witnesses decided the defendant was negligent, but set aside the verdict on the grounds that the deceased assumed the risk. A risk can only be assumed where there is some negligence on the part of somebody. The Supreme Court of Virginia affirmed the judgment of the lower Court in setting aside the verdict of the jury on the theory of non-negligence. Such decision is not in accord with the applicable decision of the Supreme Court of the United States. The plaintiff has been denied her rights under the Federal Employers Liability Act. The decision of the Supreme Court of Appeals of Virginia in this case, not being in accord with the decision of the Supreme Court of the United States, will create a diversity of decisions in the lower Courts and will thereby seriously affect the administration of the law in other similar cases.

III.

Summary and Brief Statement.

Nellie Faye Beamer, Administratrix, brought an action against The Virginian Railway Company, a Corporation, for the sum of $50,000.00 damages, based upon the wrongful death of plaintiff's decedent, Robert P. Beamer, an employee of The Virginian Railway Company, engaged in the

business of Interstate Commerce, and covered under the provisions of Federal Employers Liability Act.

The jury returned a verdict in favor of the plaintiff for the sum of $10,000.00. The Judge of the Circuit Court of Giles County, Virginia, set aside the verdict of the jury on the ground that the plaintiff's decedent assumed the risk of his employment, as disclosed by the evidence, as a matter of law, and entered up judgment in favor of the defendant; the Supreme Court of Virginia affirmed this judgment on the grounds of non-negligence.

Robert P. Beamer, an employee of The Virginian Railway Company, at its power plant at Narrows, Virginia, died from working in extreme heat on July 26, 1940, while on duty at the plant. Immediately prior to Mr. Beamer's death, and on the morning that he went to work, he was in sound, perfect physical health. He fully enjoyed life, romped and played with his six children, four of whom were adults, and never missed a day's work except on occasions of sickness in his family.

Mr. Beamer had been employed as a steam-fitter for The Virginian Railway Company at its power plant at Narrows, Virginia, for approximately fifteen years. Mr. Cleve Bowser, the General Foreman over the entire plant, gave instructions to Mr. Beamer as to where and what work he should do and Mr. Beamer would go ahead and do it.

Description of Power Plant and General Working Conditions.

The Virginian Railway Company operated this power plant at Narrows, Virginia, for the purpose of generating electricity to haul heavy loads of coal in Interstate Commerce between Mullens, West Virginia, and Roanoke, Virginia. This electricity is generated through four turbines heated with steam. These turbines are located in a large building approximately eighty feet wide and one hundred

fifty feet long. There are two floors, the basement floor and the so-called turbine floor. These turbines are set in the turbine floor, and this floor is approximately thirty feet above the basement floor. The turbine floor is about four or five feet above ground level. This leaves approximately twenty-six feet of the basement below ground level. There are no outside windows to this basement and no mechanical ventilating system. The upstairs room, spoken of as the turbine floor room, has many windows on its sides and air ventilators in the top. There are openings through the floor of the turbine room between turbines Nos. 1 and 2, and between turbines Nos. 3 and 4. There was a thermometer on the turbine floor which gave the temperature of that room at all times, but there was no thermometer in the basement room. No temperature reading was ever taken in the basement floor room and in particular no temperature was ever taken at the place where Mr. Beamer was working immediately prior to his death. Mr. Beamer and no other person had ever done this kind of work for a period of two hours at this particular place. A great amount of dust accumulated on the pipes and other parts of the machinery in the basement room and the pipes and turbines were dusted about once every two years. The temperature of the basement room, at the place where the deceased was required to work at hard physical labor from about one-thirty, p. m., to three-thirty, p. m., was 132 degrees Fahrenheit, and there was very little, if any, circulation of air.

Nature of Work the Deceased Was Doing Immediately Prior to His Death.

Mr. Bowser, General Foreman, instructed Mr. Beamer that turbine No. 1 was not functioning properly and directed him to go over turbine No. 1 on the day of the death of Mr. Beamer.

Shortly after noon of that day, Mr. Beamer reported to Mr. Bowser that he had found a large expansion joint in the heater line broken in turbine. Mr. Beamer stated to Mr. Bowser that if he repaired that joint he would have to work overtime, that it would take him longer than four o'clock that afternoon to finish it. Employees were not permitted to work overtime without the consent of their Foreman. Mr. Bowser directed Mr. Beamer to go into the storeroom and get a new joint because by using the new joint he could finish it by four o'clock. Mr. Beamer told his helper, Mr. Wimmer, that he had to finish the expansion joint by four o'clock. This expansion joint which was being replaced was located next to the ceiling of the basement floor. Mr. Wimmer got to this expansion joint by going through a panel about twenty-eight inches by fifty inches on turbine No. 1, but Mr. Beamer, being a large man weighing approximately two hundred twenty pounds, went down the elevator, up a stairway and climbed up to the pipes on a small platform located next to the ceiling to do this work. An air hose was available for the use of Mr. Beamer and Mr. Wimmer, but was not used because of the large accumulation of dust. The pipes were so hot that you could not lay your hand on them. There was very little circulation of air or no ventilation at the place Mr. Beamer and Mr. Wimmer were required to work. The temperature was 132 degrees Fahrenheit. They continued to work under these conditions in putting in this new expansion joint for approximately two hours. They went outside on two different occasions to cool off. All employees were allowed to go outside to cool off when they wanted to. Mr. Wimmer did not realize the heat in the place where they worked these two hours was so intense. He did not know it was so hot in there until after he took the temperature.

At about twenty minutes to four o'clock, they completed the work on the expansion joint and Mr. Beamer handed the tools through this panel opening to Mr. Wimmer. Mr. Wimmer went on to put up the tools and Mr. Beamer then went on to the tool room where he fell and died about twelve or thirteen minutes to four o'clock. Two of The Virginian Railway Company doctors were called but were not available. However, later Dr. Newton, one of The Virginian Railway Company doctors, did arrive at the plant and viewed the body of Mr. Beamer. Dr. Newton testified that in his opinion, "the working in extreme heat that the extreme heat was the cause of his death." Dr. Carr, the other doctor of The Virginian Railway Company, was of the opinion that the intense heat and long hours of work played an important part in Mr. Beamer's death.

Quotations from Evidence Supporting the Foregoing Facts.

Mr. Bowser, the General Foreman, testified (R. 118), "I would tell him (Mr. Beamer) where a leak or change should be made and he would go ahead and do it." Mr. Bowser also testified (R. 120), that Mr. Beamer reported to him that he found a large expansion joint broken in turbine No. 1; that if he, Mr. Beamer, repaired the joint he would have to work overtime; that it would take him longer than four o'clock to finish it. He, Bowser, directed Beamer to get a new joint so that he could finish by four o'clock.

Mr. Wimmer testified on cross examination (R. 56):

> "Q. It was Mr. Beamer's own idea to finish it, was it? There was nobody pressing him to finish it, was there?
>
> "A. I don't know who told him, but he told me that he had to finish it by quitting time at 4:00 o'clock."

Mr. Wimmer (R. 59) testified that Mr. Beamer could not work overtime without permission of Mr. Bowser or another foreman. Mr. Wimmer (R. 48-49) stated:

"Q. Did you and Mr. Beamer use that air hose that day?

"A. No, sir.

"Q. Had you ever used that air hose right in that particular place where you all were working on the expansion joint?

"A. No, sir, we never used the air hose up under there.

"Q. What was the condition of these pipes there at the place you were working, with reference to dust and filth?

"A. Well, it was dusty and dirty up in there, and these pipes were covered with this asbestos.

"Q. And dust would stick on them, would it?

"A. Yes, sir.

"Q. What would have been the effect, if any, of attempting to use that air hose in there where you were working on the expansion joint, with that condition with reference to dust?

"A. If you took the air hose and stuck them in there, and aimed to work there at the time, it would be so dusty, you could not do it. If you had time to take an hour or so to blow it out, it would be all right, but if you stuck it in there and would go in there to work, it would be so dusty, you could not stay in there.

"Q. Were you all the janitors in there?

"A. No, sir, we had a colored fellow that did the sweeping in the turbine room, but didn't nobody clean out or blow it under there.

"Q. Nobody cleaned or blew out the dust in this particular place where you were working?

"A. No, sir."

Mr. Bowser testified (R. 126-127) that the dust is blown off the machine when it is open for inspection; that the machines are open for inspection about every two years.

"Q. Did you ever inspect to see if it is kept clean during that time?

"A. No, sir."

HEAT.

Mr. Wimmer testified (R. 61) with reference to the place where he and Mr. Beamer were working:

"A. The pipes were hot up there.

"Q. How hot were they?

"A. They were so hot you could not touch them.

* * * * * * *

"Q. I believe you stated that it was 132 degrees Fahrenheit at the time you went there to take the temperature with Mr. Shands. Is that right?

"A. Yes, sir.

"Q. Was it any hotter at that time than when you quit working, to the best of your judgment?

"A. No, sir, it was not any hotter; I should say it was about the same."

Mr. Wimmer testified (R. 51):

"Q. At the time you and this other gentleman that you have named took this temperature—Mr. Shands—took the temperature and found it to be 132 degrees Fahrenheit, did you realize it was as hot in there as it actually was?

"A. No, sir; I knew that I was awfully hot, but I didn't know that it was that hot until we took the temperature.

"Q. Who was Mr. Shands?

"A. He is the electrical foreman there."

Mr. Wimmer further testified (R. 49):

"Q. What was the condition there in that place where you all were working at the time you took the temperature, with reference to the condition it was at the time you all were doing your work there and left that place?

"A. It was in the same condition, just like it was when we was under there."

Mr. Wimmer testified (R. 47):

"Q. What was the condition of his clothing with reference to perspiration or otherwise?

"A. It was wringing wet with sweat. I was hot and he was, too."

VENTILATION.

Mr. Wimmer testified with reference to the ventilation where he and Mr. Beamer were working (R. 44):

"Q. What was the condition of the ventilation in there at the time you all were working?

"A. Well, it was awfully hot in there. There was not much ventilation in there where we were working."

Mr. Bowser testified (R. 125):

"Q. Do you have a thermometer in the basement room?

"A. Not to measure the temperature of the air.

"Q. Do you ever measure the temperature of the air in the basement room?

"A. We never made any record of it.

"Q. Have you ever tested the air in there as to the quantity of oxygen and heat in the basement room?

"A. No, sir.

"Q. Have you ever measured the air and taken the temperature at the place where Mr. Beamer was working on the expansion joints?

"A. No, sir.

"Q. You knew it was a hot place, didn't you?

"A. Yes, sir.

"Q. And you knew in the summer that it would get extremely hot in there, didn't you?

"A. Yes, sir.

"Q. Did you, as foreman, ever do anything to cool the basement, such as putting exhaust fans in there?

"A. No, sir.

"Q. Did you ever recommend that that be done?
"A. No, sir."

Mr. Bowser testified (R. 132):

"Q. What makes the air circulate from the back of turbine No. 1 where there is no opening?
"A. It would not circulate unless you use some mechanical means to circulate it."

Mr. Fox testified (R. 156):

"Q. Mr. Beamer was repairing turbine No. 1, was he not?
"A. Yes, sir.
"Q. And there was no need to be efficient there, because it was shut down on that turbine?
"A. Yes, sir.
"Q. And there was no reason why he couldn't have sufficient ventilation, was there?
"A. No, sir."

Mr. Blake testified (R. 96):

"Q. And your idea is that there is no ventilation and that is derived from the fact that you saw the place up there in the pipes from down on the basement floor and you don't know what was above that place except what you were told. Is that right?
"A. My idea was that there was no ventilation and I saw no way for ventilation to get there."

IV.

The Questions Presented.

1—Do the facts in this case present a question to be determined by a jury, or only by the Courts?

2—Has the plaintiff been denied (relief) a substantive right given to her under the Federal Statutes known as The Federal Employers Liability Act?

3—Is the opinion of the Supreme Court of Appeals of Virginia, in this case, at variance with laws as established by the opinions of this Honorable Court?

4—Whether or not part of the opinion of the Supreme Court of Appeals of Virginia recognized that the doctrine of assumption of risk had been abolished, but in other parts of the opinion the Court still applied the doctrine of assumption of risk as well as contributory negligence. Quoting from the opinion: "He, (Beamer) knew the place was hot. The efficiency of the plant could not have been maintained and the heat eliminated. Employees are often called upon to work in places that are hot and dusty. It was not hotter where Mr. Beamer was working than is required by standards of good practice for such plants."

5—The Supreme Court of Appeals of Virginia erroneously held it to be the duty of the deceased to clean out the dust and dirt before going to work on the expansion joint; however, the undisputed evidence discloses it to be a fact that the deceased could not have completed his task and also cleaned out the dirt and dust within the time allowed by the Foreman to complete this specific task.

6—Whether or not the evidence of the plaintiff was ignored by the Court in its opinion wherein the Court held that there was no evidence of negligence on the part of the defendant.

V.

Reasons Relied Upon for the Allowance of the Writ.

FIRST:

The Circuit Court of Giles County, Virginia, erroneously set aside the verdict of the jury and entered up judgment for the defendant on the theory that the defendant assumed the risk of his employment, (R. 41, in Bill-of-Exceptions

No. 1). The said Circuit Court in effect held that the doctrine of assumption of risk had not been abolished as of the date of the injury on July 26, 1940.

The Supreme Court of Appeals of Virginia affirmed the lower Court, but on different grounds, holding there was non-negligence on the part of the defendant. This was error, and in conflict with the following decisions:

Tiller v. *Atlantic Coast Line Ry. Co.*, 87 Law Ed. Advance Opinions No. 8, p. 454;
Bailey v. *Central Vermont Ry. Co.*, 87 Law Ed. Advance Opinions No. 16, p. 1030;
Owens v. *Union Pacific Ry. Co.*, 87 Law Ed. Advance Opinions No. 18, p. 1221;
E. I. Dupont De Nemours & Co. v. *Brown*, 129 Va. 112, 105 S. E., 660;
Thacker v. *Klotz*, 175 Va. 267, 7 S. E. (2d) 883;
Turner v. *Richmond & R. R. Ry. Co.*, 121 Va. 194, 92 S. E., 841;
Lynchburg Traction & Light Co. v. *Gordon*, 123 Va. 198, 96 S. E., 195.

SECOND:

The Supreme Court of Appeals of Virginia erroneously held, in substance and effect, that evidence of general custom of a trade or business engaged in similar work, under like circumstances, is conclusive. We understand the law to be that evidence of general custom of a trade or business engaged in similar work under like circumstances is never conclusive, but is proper evidence to be considered along with all the other evidence, facts and circumstances in the case as to whether or not the defendant is guilty of negligence.

Roberts v. *Southern Ry. Co.*, 138 S. E., 658;
Texas & P. R. Co. v. *Behymer*, 189 U. S., 468.

THIRD:

The Supreme Court of Appeals of Virginia erroneously held that although it is disclosed by the evidence that the pipes to be repaired were dusty, that the ventilation around them was poor and that it was very hot, that these conditions do not constitute actionable negligence under the circumstances disclosed in this case.

We believe the uncontradicted evidence clearly shows that the place in which Mr. Beamer was required to work was dirty and dusty, with a temperature of 132° F., with practically no circulation of air, and that he was required to complete a definite task before four o'clock to prevent overtime work; that under such conditions it was physically impossible to clean up the dust and dirt and to perform the task within the time allowed by the Foreman. Any negligence of the defendant which caused or contributed in whole or in part to plaintiff's injury, is actionable negligence.

Washington & G. R. Co. v. *McDade*, 135 U. S., 554, 572, 34 Law Ed. 235, 241;

Wilkens v. *Davis, et al.*, 158 Va., 763, 164 S. E., 650;

Appalachian Electric Power Co. v. *Hale*, 133 Va., 416, 113 S. E. 711;

Thornton v. *Downes*, 177 Vt., 451, 14 S. E. (2d) 345;

Atlantic Coast Line v. *Wheeler*, 147 Va., 1, 132 S. E., 517;

Adams v. *G. C. Murphy Co.*, 174 S. E., 794;

Jones v. *Rhinehart & Dennis Co.*, 168 S. E. 482;

Depre v. *Pacific Coast Forage Co.*, 259 Pacific, 720;

Doney v. *Minn. Manfg. Co.*, 161 Minn. 240, 201 N. W., 305;

Hughes v. *Trustees St. Patrick's Cath.*, 156 N. E., 665.

FOURTH:

The Supreme Court of Virginia erroneously held that the other negligence complained of was either not sustained by the evidence or was not the proximate cause of the death of Mr. Beamer. The evidence is conclusive by two of the physicians of the defendant, The Virginian Railway Company, that performing hard, manual work in excessive heat caused the death of Mr. Beamer. All of the attending circumstances surrounding such employment, and every act of omission and commission must be considered together and not as separate, distinct, abstract fact or facts. The fact that the place was dusty and dirty, was extremely hot, that there was no ventilating system, that it was not inspected, that there was no means of testing the temperature or testing the air for oxygen or otherwise, and the fact that a definite task was to be performed, within a definite period of time, and evidence of the incompetency of the Foreman, must all be considered together, and the jury is the arbiter of all these questions.

Conclusion.

It is therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision and judgment of the Supreme Court of Appeals of Virginia may be made to conform to the decisions and principles announced by this Court, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Appeals of Virginia, and finally reverse it.

CARLTON CUSTER SANDERS,
Counsel for Petitioner.

STATE OF WEST VIRGINIA,
County of Raleigh, to-wit:

Carlton Custer Sanders, of Beckley, West Virginia, being first duly sworn, upon his oath says that he is a practicing attorney in the Supreme Court of the United States of America, having been duly admitted and qualified on the 15th day of February, 1934; that he is familiar with the facts set forth in the foregoing petition and record, and that in the opinion of this affiant, a writ of certiorari should be granted and that this Court should review the decision of the Supreme Court of Appeals of Virginia, and finally reverse it.

CARLTON CUSTER SANDERS.

Taken, subscribed and sworn to before me by Carlton Custer Sanders, this the 9th day of December, 1943, in my said County of Raleigh, State of West Virginia.

My Notarial commission expires October 5, 1950.

LEAH TONEY TRAIL,
Notary Public.